Children's Hospital of Michigan, Henry Ford Health System, Mount Clemens General Hospital, and Cottage Hospital of Grosse Pointe *and* Michigan Association of Police—911. Cases 7–CA–31328, 7–CA–31405(2), 7–CA–32435, and 7–CA–32443

May 24, 1995

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On March 28, 1991, the National Labor Relations Board issued its Decision and Order in *Children's Hospital of Michigan*,[1] on June 10, 1991, the Board issued its Decision and Order in *Henry Ford Health System*,[2] and on December 31, 1991, the Board issued its Decision and Order in *Mount Clemens General Hospital*.[3] On October 8, 1993, the United States Court of Appeals for the Sixth Circuit issued its decision in a consolidated proceeding affirming the Board's Orders in the above cases in part and remanding the cases for consideration by the Board of certain evidence that it found to be ''newly discovered'' concerning the certifiability of the Union as representative of the Respondents' guards.[4] Thereafter, the Sixth Circuit also remanded to the Board its decision in *Cottage Hospital of Grosse Pointe*,[5] as that case presents similar issues involving the certifiability of the same Union.

The Board subsequently advised the parties that it had decided to accept the court's remand as law of the case and invited them to file statements of position. Thereafter, the General Counsel, the Respondents, and the Union each filed statements of position. In addition, Respondents Henry Ford Health System and Cottage Hospital filed motions requesting consideration of newly discovered evidence, which the other Respondents joined, and the General Counsel and the Union filed oppositions to the motions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the evidence found by the court to be newly discovered and the parties' statements of position and has decided to reaffirm its prior Orders for the reasons set forth below.

I. BACKGROUND

The facts, as more fully set forth in the Board's prior decisions, are as follows. The Union is affiliated with the Michigan Association of Public Employees (MAPE), which represents certain employees of the State of Michigan and its political subdivisions. The Union also represents nonguard public employees. On various dates in 1990 and 1991, following secret-ballot elections conducted by the Board, the Union was certified as the representative for purposes of collective bargaining of certain guards employed by the Respondents, all of which are employers under Section 2(2) of the Act. The Respondents refused to bargain with the Union on the grounds that its certification as a collective-bargaining representative is barred by Section 9(b)(3) of the Act, which provides, in pertinent part, that ''no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.''29 U.S.C. § 159(b)(3).[6] The Respondents contended that the Union was disqualified from representing their guard employees because it, and its affiliate MAPE, admit ''employees other than guards'' to membership.

The court of appeals affirmed the Board's finding that the Union, and MAPE, are not disqualified from representing statutory guards by virtue of their admission to membership of public sector employees, i.e., individuals employed by states or political subdivisions, who are not employees under the Act, and hence cannot be considered to be ''**employees** other than guards.'' *NLRB v. Children's Hospital of Michigan*, 6 F.3d at 1151–1152 (emphasis added). The court remanded these cases to the Board, however, to consider the following evidence presented by the Respondents to the court as newly discovered and that the Respondents contend that the Union admits to membership nonguards in the *private* sector: (1) a unit clarification petition filed in November 1992 by the Union in *Detroit Medical Center/Detroit Receiving Hospital*, Case 7–UC–431, together with the transcript of the hearing in that case and the Regional Director's subsequent decision; and (2) selections from the transcript of a separate representation hearing in November 1992 involving the Union in *St. Mary's Hospital of Livonia*, Case 7–RC–19922.

The court of appeals found that the Respondents' submission constituted newly discovered evidence and was material to the issue of the Union's certifiability as the representative of its employees. Noting that Section 10(e) of the Act precluded the consideration by a reviewing court of evidence not presented to the Board, the court remanded the case to the Board to receive and consider the proffered evidence. We accept these findings as law of the case only.

[1] 302 NLRB 235.
[2] 303 NLRB No. 43 (not reported in Board volumes).
[3] 305 NLRB No. 155 (not reported in Board volumes).
[4] 6 F.3d 1147 (6th Cir. 1993).
[5] 306 NLRB No. 106 (Feb. 28, 1992) (not reported in Board volumes).
[6] The Respondents do not contend that the Union represents any nonguards employed by the Respondents.

II. DISCUSSION

The standard for establishing the noncertifiability of a guard union is well settled: ''the proviso to Section 9(b), when read in context, requires that the noncertifiability of a guard union must be shown by definitive evidence. Otherwise the rights of guards to be represented by a union and of guard unions to represent guards would be seriously undermined.'' *Burns Security Services*, 278 NLRB 565, 568 (1986). Accord: *University of Tulsa*, 304 NLRB 773 (1991); *Elite Protective & Security Services*, 300 NLRB 832 (1990) (and cases cited therein). For the following reasons, we find that the evidence proffered by the Respondents does not constitute ''definitive evidence'' that the Union admits to membership employees other than guards.

A. *Detroit Receiving Hospital, Case 7–UC–431*

On March 12, 1990, the Union was certified as the representative of a unit of ''security officers, parking officers and dispatchers'' at Detroit Receiving Hospital (DRH). Although not mentioned in the unit description, the employer included its parking **attendants** and valet drivers in the *Excelsior* list, which it submitted to the Region in connection with the election, and it appears that some of the individuals in these job classifications voted in the election.[7] The Union subsequently filed representation petitions seeking to represent guards employed by each of the Respondents. Notably, in connection with the subsequent representation proceedings in these cases, Respondents Henry Ford Health System, Mount Clemens General Hospital, and Cottage Hospital each asserted that the Union's representation of the unit at DRH disqualified it from representing guard units at their respective facilities because the DRH unit was a mixed guard/nonguard unit.[8] These contentions were considered, and found without merit, by the Board.

Thus, the Regional Director's Decision and Direction of Election in *Henry Ford Health System*, Case 7–RC–19301 (July 13, 1990), carefully considered the Respondents' contentions and found, with full rationale, that the valet drivers and parking attendants were not included within the scope of the unit description to which the parties had agreed, and that there was no evidence that the Union had attempted to represent individuals in these classifications or had admitted them to membership. Under these circumstances, the Regional Director concluded that the Union was not disqualified from representing statutory guards merely because DRH itself had unilaterally included employees in the parking attendant and valet driver classifications in the *Excelsior* list and that the employees in question had accordingly been allowed to vote in the election without challenge. The Regional Director also noted that the same law firm represented both DRH and Respondent Henry Ford Health System, but found that it was not necessary to determine whether the attorneys had intentionally deceived the Union with respect to the *Excelsior* list in order to have it disqualified from representing guards.[9]

On August 16, 1990, the Board issued its order denying review of the Regional Director's Decision and Direction of Election in *Henry Ford Health System*. The prior decisions of the Regional Director and the Board in *Henry Ford Health System*, together with the record in that case, were included by reference in each of the Board's Decisions and Orders that it petitioned the Sixth Circuit for enforcement.

In light of the above, we respectfully note that the evidence concerning the existence of the purported mixed unit at DRH was not ''newly discovered'' and was indeed presented to and considered by the Board in its prior Decisions and Orders and was accordingly before the court with respect to the Board's petition for enforcement. In this regard, we reaffirm our prior finding that the circumstances surrounding the inclusion of the parking attendants and valet drivers in the *Excelsior* list for the election at DRH does not constitute ''definitive evidence'' that the Union admits nonguards to membership. To the contrary, these facts do not establish that the Union ever admitted any of the valet drivers or parking attendants to membership.

On November 13, 1992, the Union filed a petition to clarify the DRH unit to include only ''security officers.'' On January 25, 1993, the Regional Director issued a Decision and Order clarifying the unit to include ''all full-time and regular part-time security officers . . . excluding all other employees.'' We find no support for the notion that the filing and disposition of this unit clarification petition establishes that the Union admits nonguards to membership. Initially, we decline to construe the Union's filing of a unit clarification petition as an admission that the DRH unit previously included nonguards—or that it had ever admitted any nonguards to membership. Rather, we find that the fil-

[7] A representative of DRH admitted that the employer had included the parking attendants and dispatchers in the *Excelsior* list because the employer viewed them as likely to vote against representation—in his words, the employer was trying to ''second guess'' the election's outcome. Because the election at DRH was conducted pursuant to a stipulated election agreement the unit description was established by agreement of the parties rather than by litigation.

[8] Respondent Children's Hospital, in contrast, stipulated at the preelection hearing that employees represented by the Union at DRH were statutory guards. See *Children's Hospital of Michigan*, 299 NLRB 430, 433 (1990). Respondent Children's Hospital has proffered no explanation for why the Board should now allow it to avoid its stipulation and we perceive none.

[9] Apart from noting that the same law firm also represents Respondent Cottage Hospital, we agree with the Regional Director that it is unnecessary to pass on these issues at this time.

ing of the petition was simply a prudent effort to put an end to the persistent (and, from all appearances, well-coordinated) efforts by other employers such as the Respondents to rely on the DRH certification as a means for refusing to bargain with the Union. Instead, particularly in light of DRH's admitted inclusion of individuals on the *Excelsior* list for reasons other than their putative status as eligible voters, we view the Union's action as clear evidence that it did not desire or intend to admit nonguards to membership.

Moreover, we note that the Regional Director's decision clarifying the unit clearly stated that

> [t]he literal language of the [initial] unit description at issue does not include parking attendants nor valet drivers, nor is there any substantial evidence that the Petitioner has ever sought to represent such employees. . . . While I do **not** conclude that parking attendants and valet drivers are encompassed by the unit description, I conclude that it is nevertheless appropriate to clarify the unit to exclude a **non-existent classification**. Alternatively, if the term, ''parking officer,'' is viewed as encompassing the parking attendants and valet drivers, I find that they are not guards as defined in the Act and therefore should be excluded from the unit [emphasis added].[10]

Under these circumstances, we do not agree that the unit clarification decision can be read as a finding by the Regional Director or the Board that the DRH unit included nonguards prior to the clarification.

Moreover, the circumstances surrounding the initial certification of the Union at DRH further demonstrate that it did not admit nonguards to membership. Thus, the Union's constitution provides that ''an individual or organization shall be eligible for membership as long as: (a) The individual is a law enforcement officer. (b) The organization is composed of law enforcement officers.''[11] The Board has previously found that similar language restricting membership to those performing guard-like functions supports a finding that the union in question is certifiable as the bargaining representative of a guard unit. *Burns Security Services*, supra, 278 NLRB at 568. We further note that on July 31, 1990, and thereafter, the Union advised DRH, in writing, that it did not represent the DRH parking attendants or any other nonguard personnel, and that the Union ''will not admit to membership any private sector nonguards.'' The Respondents have adduced no evidence that the Union has taken any actions at DRH inconsistent with its stated position in this regard.

B. *St. Mary's Hospital, Case 7–RC–19922*

The Respondents' other ''newly discovered evidence'' submitted to the Sixth Circuit is the transcript of the November 12, 1992 hearing in *St. Mary's Hospital of Livonia*, Case 7–RC–19922. Specifically, the Respondents cited to the court the following testimony by Union Representative Brian Fisher:[12]

> Q. Okay, when you're certified, when you have an election and you win an election in the private sector, my understanding is that those people that you now represent, they are members of MAP who you then represent?
>
> A. Yes, sir.
>
> . . . .
>
> Q. Okay. I think you indicated you're negotiating at [DRH]?
>
> [A]. I believe that's one of the hospitals that they are at the table.
>
> [Q]. Okay. And the unit that you were certified for, the people in that unit, they are members of MAP?
>
> A. Correct.

See *NLRB v. Children's Hospital of Michigan*, 6 F.3d at 1152 fn. 1. Contrary to the Respondents, we do not read this testimony, even considered in isolation, as an admission that the Union admits nonguards to membership. As set forth above, the Union has never sought to represent the parking attendants or valet drivers at DRH, and has consistently maintained that they are not included in the DRH unit and that it did not represent those individuals. Read in that light, the testimony that those employees whom the Union represented, and who were in its certified unit at DRH are members of the Union wholly fails to establish that it

[10] The Regional Director found, however, that the dispatchers were statutory guards and included them in the unit. The Board subsequently denied DRH's request for review of this finding. With respect to this finding, we note that the dispatchers were included in the unit description from the beginning, by agreement of the parties to that proceeding, pursuant to the parties' stipulated election agreement. Thus, those individuals have been included in the DRH unit throughout the lengthy course of the instant proceedings involving the Respondents. Moreover, the Respondents' argument that the DRH dispatchers are not statutory guards was considered and rejected by the Board in each of the underlying decisions previously presented to the court of appeals for enforcement. Accordingly, we find that any evidence presented to the court of appeals concerning the inclusion of these individuals in the DRH unit could not have been ''newly discovered'' and we do not construe the court's remand as requiring reconsideration of the Respondents' arguments in this regard. Even if we were to revisit this issue at this time, we would find that the dispatchers are statutory guards for the reasons stated by the Regional Director in the unit clarification proceeding.

[11] See *Wackenhut Corp.*, Case 7–RM–1316 (Sept. 29, 1987). The Regional Director's Decision and Direction of Election in *Wackenhut*, together with the entire record in that case, was incorporated in these cases and is therefore part of the record herein.

[12] Coincidentally, the law firm representing St. Mary's Hospital, whose attorney posed the questions cited to the court of appeals, also represented both DRH and Respondents Henry Ford Hospital and Cottage Hospital.

admits nonguards to membership; a fortiori, it does not constitute an admission of this ''fact'' as the Respondents claim.

We further note that, when read as a whole, Fisher's testimony is even less susceptible to the strained reading suggested by the Respondents. Thus, elsewhere in the same transcript Fisher testified as follows:

> Q. Does MAP [the Union] admit to membership employees who are classified other than guards?
>
> A. In hospital settings?
>
> Q. Period.
>
> A. We have police officers in the [MAP], yes, sir.
>
> Q. Anyone other than guards and police officers?
>
> A. We have police dispatchers. I believe **that's it**. [Emphasis added.]

We further note that Fisher is not an attorney and that the Union was not represented by counsel at the hearing in the *St. Mary's* case. Under these circumstances, we find that the testimony cited above also does not constitute the ''definitive evidence'' of noncertifiability required by *Burns Security*, whether viewed in isolation or in the context of the other ''newly discovered evidence'' cited by the Respondents.

III. MOTIONS FOR CONSIDERATION OF ADDITIONAL EVIDENCE

On November 28, 1994, Respondents Henry Ford Hospital and Cottage Hospital filed identical motions requesting consideration of additional newly discovered evidence concerning the Union's certifiability. On November 30, 1994, Respondents Children's Hospital and Mount Clemens General Hospital filed papers adopting the other Respondents' motions. The motions assert that the Respondents learned for the first time in November 1994 that the Union represented a unit of security guards and entrance attendants at William Beaumont Hospital, which, the Respondents assert, is a mixed guard/nonguard unit. In support, the Respondents proffer an affidavit submitted by one David Misner, Beaumont's director of human resources, which states that the Union has requested information concerning the names, classifications, and current pay rates of both the security officer and entrance attendant classifications, and further states (without elaboration) that the Union has bargained on behalf of the employees in both classifications. Attached to the affidavit are copies of job descriptions for security officers and entrance attendants that the Respondents contend demonstrate that the entrance attendants are not statutory guards.

The Respondents' contention that this evidence precludes certification of the Union is wholly without merit. Initially, we note that the Union was certified at Beaumont on November 18, 1993, well after the Respondents refused to bargain with the Union as the representative of their respective guard employees. Even assuming that the Union had admitted nonguards to membership in 1993, the Respondents fail to explain how that fact would have privileged their prior refusals to bargain. Moreover, we find that the averments submitted by the Respondents wholly fail to establish that the Union admits nonguards to membership at Beaumont. In particular, the Respondents' motions neglect to mention that the employer in the *Beaumont* case stipulated that the entrance attendants **were** statutory guards. See *William Beaumont Hospital*, Case 7–RC–20151 (Decision and Direction of Election dated October 14, 1993). Further, the Respondents fail to mention that the unit description specifically includes only individuals ''employed by the Employer, as guards within the meaning of Section 9(b)(3) of the Act . . . .''[13] Thus, to the extent that entrance attendants are not statutory guards, they are excluded from the unit by the plain language of the unit description. The parties to the *Beaumont* case having conclusively agreed that the unit involved is composed solely of statutory guards, we decline to allow the Respondents here to collaterally attack their conclusive stipulation. See *Burns Security Services*, supra, 278 NLRB at 569 (allowing parties to establish noncertifiability through collateral litigation of guard status of employees of other employers contrary to clear intent of Congress).

Conclusion

The developments in this case demonstrate the wisdom of the policy set forth in *Burns Security Services* requiring that the noncertifiability of a guard union must be shown by definitive evidence. As the Board recognized in *Burns*, it would be contrary to the clear intent of Congress to allow an employer to establish noncertifiability by collateral litigation of the guard status of other employer's employees, i.e., by attempting to show that the union ''may represent someone somewhere who we would find in an appropriate proceeding is not a guard.'' *Burns Security Services*, supra at 568–569. We find that the Respondents' ''newly discovered'' evidence is precisely this type of collateral litigation. Accordingly, we shall reaffirm the Board's prior Orders in these cases.

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[13] The unit description reads:

> All full-time and regular part-time security officers and entrance attendants employed by the Employer, as guards within the meaning of Section 9(b)(3) of the Act . . . but excluding all office clerical employees, professional employees, technical employees, service and maintenance employees and supervisors as defined in the National Labor Relations Act.

ORDER

The National Labor Relations Board reaffirms its prior Orders requiring these Respondents to bargain with the Union as the representative of their employees in the units previously found appropriate, and orders that the Respondents, Children's Hospital of Michigan, Henry Ford Health System, Mount Clemens General Hospital, Detroit, Michigan, and Respondent Cottage Hospital of Grosse Point, Grosse Point Farms, Michigan, their officers, agents, successors, and assigns, shall take the action set forth in those Orders.